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Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Tariff Filing Requirements for Nondominant Common Carriers	)	CC Docket No. 93-36
	)	
	)	

To: The Commission

COMMENTS OF TELECOM SERVICES GROUP, INC.

Robert W. Healy, Esquire

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March 29, 1993

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Telecom Services Group, Inc. ("Telecom"),[1] by its attorneys, hereby respectfully submits its Comments in the above-captioned rulemaking proceeding ("N.P.R.M."). Telecom is a carrier's carrier. There is attached hereto a map depicting the nationwide telecommunications network provided by Telecom. Since Telecom is a carrier whose customers are either common carriers or private carriers, Telecom is correctly described as a carrier's carrier.[2]

In this proceeding, Telecom wishes to express two concerns

proceeding should be used to permit carriers providing service pursuant to long term fixed rate contracts to increase those rates on less then fourteen days notice and also to be required in that filing to meet the "substantial cause for change" test. Moreover, the Commission should amend Section 61.58(a)(4) of its rules (47 CRF § 61.58(a)(4)) to eliminate the reference to dominant carriers and require that all carriers providing service pursuant to an FCC tariff filing, give at least thirty (30) days notice for rate increases or other detrimental changes in their service offerings.

Second, the Commission should use this proceeding to reiterate that a carrier's carrier offering does not require a tariff filing because of a specific exemption contained within the Communications Act.

(A The One Day's Notice Rule Should Not Apply To Tariff Offerings That Involve Any Increase In Rate Or Charge Or Would Effectuate And Authorize Discontinuance, Reduction Or Other Impairment Of Service.

For over a decade, non-dominant carriers have provided service pursuant to contract, rather than tariffs. However, where a carrier files a tariff which changes the terms set forth in the contract the tariff controls and supersedes the contract's terms.[3] As a result of forbearance, there now exists thousands of such contracts of all types. In some of these Telecom is the carrier and in some of these Telecom is the customer. While some of the carriers that lease fiber optic capacity to Telecom are

[3] Eternal Word Television Network, 62 RR 2d 669, 671 (Chief Common Carrier Bureau, 1987)("Eternal Word").

private carriers[4] a private carrier can become a common carrier simply by declaring that it intends to be a common carrier and filing a tariff.

Telecom is well aware of the mischief that could result if as a result of this proceeding, customers had no choice other than that faced in Eternal Word of either paying substantially higher rates for the same service or paying termination charges. It is only in the rare case where the contractual arrangement itself has been found to be unlawful that the FCC has held that the customer is free to elect to terminate the contract without payment of penalty.[5]

Telecom submits that no change in the terms of these existing contractual arrangements between carrier and customer should be permitted by these new tariff filings, unless the carrier has met the "substantial cause for change" test set out in the three RCA Americom decisions.[6]

The relevant principals of law, as established by the FCC in the RCA Americom Decisions are set forth below:

> The long term service arrangements found in RCA Americom's current tariff bear similarities to service contracts often entered into by unregulated firms. The carrier offers definite terms for a fixed period, most likely after negotiations with potential customers who decide whether to accept the offer based upon whether the offering meets their needs at a price they are

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[4] Norlight, 2 FCC Rcd 132 (1987).

[5] See, e.g., Local Exchange Carrier's Individual Basis DS 3 Service Offerings, 5 FCC Rcd 4842 (1990).

[6] RCA Americom Communications, Inc., 84 FCC 2d 353 (1980) (RCA Investigation Order); 86 FCC 2d 1197 (1981) (RCA Rejection Order); 2 FCC Rcd 2236 (1987) (RCA Reconsideration Order) jointly RCA Americom Decisions.

willing to pay. The rates and the length of the service term would of course be among the most important terms for customers. In this case, the question is raised as to whether customers have chosen RCA Americom's service because of those terms, and relied upon its terms in contracting with their own customers, as well as in making investments and other business decisions.

RCA investigation Order, 84 FCC 2d at 357.

At the same time, a carrier's proposal to modify extensively a long term service tariff may present significant issues of reasonableness under section 201(b) of the Act which are not ordinarily raised in other tariff filings. In our judgment, the right of a carrier to change its tariff unilaterally should be viewed in a different light when the tariff itself represents, in large measure, a quasi contractual agreement between the carrier and the customer. We have recognized in the Competitive Carrier Rulemaking the benefits which contracts bring to the carrier-customer relationship. The private negotiation process will generally, in the absence of market power, conclude in more efficient bargain than that which our regulatory process would artificially impose. Contracts also lend certainty to the process. In contrast, any commitment reflected in a tariff would be fully binding on the customer as a matter of law (Section 203, 47 USC § 203) yet the carrier would remain free to change the terms of service offering at

RCA Investigation Order, 84 FCC 2d at 358-359.

> The 'Sierra-Mobile' doctrine[7] restricts federal agencies from permitting regulates to unilaterally abrogate the private contracts by filing tariffs altering the terms of those contracts.
>
> The FCC says the doctrine does not apply to the present Settlement Agreement because Bell's rate relationship with the OCCs was governed by tariffs, not by the Agreement. That contention is without merit. A contract, such as the Agreement here, may refer to rates included in a tariff and yet continue to enjoy protection under Sierra-Mobile....Contracts and tariffs are not always mutually exclusive, but may be used in concert to define the relationship of the parties. In such circumstances, the contract governs the legality of subsequent tariff filings. "Rate obligations are valid; rate filings inconsistent with contractual obligations are invalid.

Thus, in this proceeding Telecom submits that were it to be found that tariff's must be filed, that in any case where the service is provided pursuant to long term contracts no carrier should be permitted to modify the contract terms by its tariff filing, unless it has met the "substantial cause for change test". Any tariff that proposes an increase over the rates and terms set forth in the existing contract should be presumed to be unlawful.

(B) The Court Did Not Address The Carrier's Carrier Exception.

In the N.P.R.M. the Commission was careful to note that the only issue before the Court in AT&T v. FCC, 978 F.2d 127 (D.C. Cir. 1992), rehearing en banc denied, January 21, 1993, was the elimination of the forbearance doctrine as to tariff filings. For example, at par. 6 of the N.P.R.M. the Commission notes that

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[7] FPC v. Sierra Pacific Power Co., 350 US 348 (1956) and United States Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 US 332 (1956). (The Sierra-Mobile Doctrine).

the policy of forbearance as to the application of Section 214 (47 U.S.C. § 214) was "unaffected by the court's decision".

Telecom respectfully submits that the FCC should take this opportunity to reaffirm the doctrine that a carrier's carrier

other carriers are by statute exempt from the tariff filing requirements.

Respectfully submitted,

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